COURT OF APPEALS
DECISION
DATED AND FILED

January 5, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1927 **Cir. Ct. No. 2007JV1140**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN THE INTEREST OF DEVON H., A PERSON UNDER THE AGE OF 18:
STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DEVON H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JANE V. CARROLL, Judge. *Affirmed and cause remanded with directions*.

¶1 FINE, J. Devon H. appeals the order adjudicating him delinquent for committing the crime of first-degree sexual assault of a child. *See* WIS. STAT. § 948.02(1). He claims that there was insufficient evidence to support the trial court's finding of guilt. We affirm.

I.

¶2 Devon H. was born in January of 1991. His victim, Kaela N.-B., was born in April of 1999. The assault, as found by the trial court, took place on May 6, 2007, when Kaela's family was visiting Devon's family, with whom they were friendly.

¶3 Kaela was just shy of nine and one-half years when she testified at Devon's trial. She related how Devon got her into a bedroom closet and touched her vaginal area with his penis, after he both first pulled her skirt to her feet and her panties to her mid-thighs, and pulled his pants and underwear to his mid-thighs. She testified that Devon did not penetrate her but, rather, his penis, "only touched" her vaginal area. One of Kaela's cousins, Eunice J., also nine at the time of the trial, testified that she opened the closet door and saw Kaela on top of Devon, telling the trial court that Devon was standing and that Kaela was "[l]ike around his waist" facing each other.

¶4 Kaela's mother also testified, and told the trial court that when they returned home after the gathering at Devon's family's house, Kaela cried and did not seem to be her usual happy self. When Kaela's mother asked Kaela what was wrong, Kaela told her that Devon "had touched her and he put his 'pee-pee' inside her."[1] Kaela's mother examined her and "saw a little discharge" from her daughter's vaginal area but no redness. Kaela then got into the bathtub with her sister, and Kaela's mother called Devon's mother and asked her to come over.

[1] Devon's lawyer objected to this aspect of Kaela's mother's testimony as being "hearsay," but the trial court overruled the objection, determining in a careful analysis that what Kaela told her mother at the time was admissible as an excited utterance under WIS. STAT. RULE 908.03(2). On this appeal, Devon does not contend that the trial court's ruling was wrong.

When Devon's mother arrived, they got Kaela out of the tub and examined her again. Devon's mother is a Licensed Professional Nurse, and she did not see any redness in or any discharge from Kaela's vaginal area.

¶5 Both Kaela's mother and Devon's mother testified that during the gathering at Devon's family's house, the adults checked the children frequently and did not notice anything out of the ordinary.

¶6 The trial court found both Kaela and Eunice to be "very credible as to this offense that is described as to Kaela," and found that the State had proven "beyond a reasonable doubt that Devon did commit the sexual assault on May 6th of 2007." It thus adjudicated Devon "delinquent of the first-degree sexual assault of a child." As we have seen, Devon's only contention on appeal is that there was not sufficient evidence to find him guilty beyond a reasonable doubt. *See* WIS. STAT. § 938.31(1) (delinquency must be proved "beyond a reasonable doubt").

II.

¶7 WISCONSIN STAT. § 948.02(1)(e) makes it a Class B felony for someone to have "sexual contact with a person who has not attained the age of 13 years."[2] Our review of a finding of guilt is narrow when the sole issue is whether there was sufficient evidence to support the finding:

[2] The order adjudicating Devon delinquent gives WIS. STAT. § 948.02(1)(b) as the provision violated. That subsection makes it a Class B felony for someone to have "sexual intercourse with a person who has not attained the age of 12 years." This matter was charged as a "sexual contact" case, and as we discuss in the main body of this opinion, the testimony supports the trial court's finding beyond a reasonable doubt that Devon had sexual contact with Kaela. Devon on this appeal does not assert that what we see as a scrivener's error in the document reifying the trial court's determination of delinquency affects his rights. Accordingly, although we affirm, we remand this matter so the order adjudicating Devon delinquent can be amended to reflect the correct statute, WIS. STAT. § 948.02(1)(e). *See* WIS. STAT. RULE 805.18(1) ("The (continued)

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752, 757–758 (1990) (citation omitted). Further, we defer to the fact-finder's assessment of the credibility of the witnesses. *See* WIS. STAT. RULE 805.17(2) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."); *see also* ***Waukesha County v. Steven H.***, 2000 WI 28, ¶51 n.18, 233 Wis. 2d 344, 368 n.18, 607 N.W.2d 607, 619 n.18.

¶8 Here, Kaela testified that she was assaulted, and the trial court found her to be "very credible." Further, her testimony was bolstered by her mother's assessment of her demeanor following the assault, and was also corroborated by Eunice's testimony that she saw Devon and Kaela in the odd position she described. Further, given Kaela's testimony that Devon "only touched" her vaginal area with his penis, it is not surprising that Devon's mother did not see any redness or discharge, especially since Kaela was in the bathtub before Devon's mother arrived at Kaela's house that night.

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court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.")

Under no stretch of the imagination can it be said that there was not sufficient evidence to support the trial court's determination that Devon was delinquent for having unlawful sexual contact with Kaela on May 6, 2007. Accordingly, we affirm, but remand for correction of the Record, as noted in footnote 2.

By the Court.—Order affirmed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.